No. 95-1441

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether custodial parents seeking child support payments from noncustodial parents may sue state officials under 42 U.S.C. § 1983 for alleged violations of child support program agreements concluded between the States and the federal government pursuant to Title IV-D of the Social Security Act.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and con-

tinuing interest in the issue presented here: when federal spending statutes create rights that are enforceable against state and local governments under 42 U.S.C. § 1983.

This case concerns Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 601-617, 651-669, which condition funding for Aid to Families with Dependent Children (AFDC) on the recipient State's creation of a child support enforcement program. In this case, a divided panel of the Ninth Circuit held that Title IV-D confers a right upon custodial parents, cognizable in federal court under Section 1983, to demand that such a program be implemented and operated in a manner that satisfies the plaintiffs.

The Court's decision regarding the existence of enforceable rights under Title IV-D will directly affect *amici* and their members; it will have an immediate effect on the allocation of scarce state resources and on the structure of state child support systems. *Amici* also have a broader interest in the law governing Section 1983 actions that challenge the administration of federal spending programs. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT OF THE CASE

1. Under the cooperative federal-state venture created by Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-617, States that have filed plans with the Secretary of Health and Human Services ("the Secretary") "for aid and services to needy families with children" may receive funds for the Aid to Families with Dependent Children ("AFDC") program. 42 U.S.C. § 602(a). Section 602 addresses the content of such plans, indicating that they must contain a number of specified elements; it declares, among other things, that the "State plan * * *

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

must * * * provide that the State has in effect a plan approved under part D of this subchapter and operates a child support program in substantial compliance with such plan." 42 U.S.C. § 602(a)(27). Under Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669, a participating State also must have a "plan for child and spousal support" that provides for the designation or creation of a state unit that will have responsibility for such services as establishing paternity, locating absent parents, and collecting child support. 42 U.S.C. § 654. In addition, Title IV-D provides that participating States "must have in effect laws requiring the use of [specified] procedures * * * to increase the effectiveness of the program which the State administers under this part." 42 U.S.C. § 666(a); *see* 42 U.S.C. § 654(20)(A).

The principal responsibility for child support enforcement is thus left to the States, but the federal government monitors and evaluates state programs. Congress vested authority in the Secretary to promulgate specific regulations implementing the requirements of Title IV-D. 42 U.S.C. § 652. In addition, the Secretary is directed to withhold federal funds from participating States upon a finding that "in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) of this title to be included in the plan." 42 U.S.C. § 604(a)(2). To this end, the Secretary conducts audits at least every three years in which she evaluates substantial compliance across a range of criteria. 42 U.S.C. § 652(a)(4); 45 C.F.R. § 305. For most criteria, substantial compliance is defined to mean no more than 75% compliance. 42 U.S.C. § 652(g)(1); 45 C.F.R. § 305.20(a)(3). If a State is not in substantial compliance, the Secretary must reduce payments to the State, although she has discretion within a specified range as to the amount of the reduction. 42 U.S.C. § 603(h)(1).[2]

[2] Under Section 603(h)(1), payments to the States "shall be reduced (subject to paragraph (2)) by—

The Secretary must suspend the reductions, however, if a State submits a "corrective action plan" that is approved by the Secretary. 42 U.S.C. § 603(h)(2).

2. Petitioner Linda Blessing is the Director of the Arizona Department of Economic Security ("ADES"), Arizona's designated Title IV-D agency. ADES administers the Title IV-D program and provides child support enforcement services both to persons who receive AFDC payments and to those who do not. *See* 42 U.S.C. § 654(6); 45 C.F.R. § 302.33(a). ADES services hundreds of thousands of applicants.[3] In providing assistance to these applicants, ADES requires substantial cooperation both from other branches of the Arizona government and from other States.[4]

The Secretary conducts regular audits of ADES to ensure that it is in substantial compliance with Title IV-D. In response to the 1989 audit, which found certain defects, Arizona submitted a corrective action plan. *See* Defendant's Motion to Dismiss Plaintiffs' Complaint, Ex.

(A) not less than one nor more than two percent, or

(B) not less than two nor more than three percent, if the finding is the second consecutive such finding made as a result of such a review, or

(C) not less than three nor more than five percent, if the finding is the third or a subsequent consecutive such finding made as a result of such a review."

[3] The Secretary's published figures indicate that there were 307,060 open case files in Arizona in 1994, but that number constantly fluctuates as ADES closes old cases and opens new ones. *See* Child Support Enforcement, 19th Annual Report to Congress 48 (1994). The total caseload for all States in fiscal year 1994 was over 18 million. *Id.* at 59, Table 2.

[4] *See generally* 42 U.S.C. § 654(4)(B) (regarding reciprocal arrangements with other States and utilization of federal courts); 42 U.S.C. § 654(7) (regarding cooperative arrangements with courts and law enforcement); 42 U.S.C. § 654(8) (regarding cooperation with other States); 45 C.F.R. § 302.10 (plan may be administered by State or state subdivision).

A-1. After Arizona implemented this plan, the Secretary conducted a follow-up audit and, in September 1994, declared Arizona to be in substantial compliance with Title IV-D. *See* Pet. Cert. Rep. Br., App. 1-3.

On February 22, 1993, respondents filed a class action suit against petitioner under 42 U.S.C. § 1983. Respondents represent a proposed class of approximately 300,000 custodial parents in Arizona who are eligible to receive child support enforcement services under Title IV-D. Respondents sought a declaratory judgment that the operation of Arizona's child support enforcement program violates Title IV-D. They also asked the court for a permanent injunction requiring affirmative measures to achieve and sustain substantial compliance with Title IV-D. The district court granted summary judgment to petitioner, holding that Congress foreclosed any right of action by individuals to enforce Title IV-D. Pet. App. 1b-10b.

A divided panel of the court of appeals reversed. Pet. App. 1a-46a. Applying the test articulated in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), the majority held that Title IV-D creates rights because the statute establishes binding obligations (Pet. App. 14a) that are not too vague or amorphous to apply (*id.* at 18a) and that were intended to benefit respondents. *Id.* at 18a-19a. The majority further held that Congress did not foreclose private judicial remedies, reasoning that the auditing and funding requirements established by Congress do not provide for judicial enforcement and are not sufficiently remedial. *Id.* at 23a-34a.

Judge Kleinfeld dissented. Pet. App. 36a-46a. Analyzing the case under *Suter* v. *Artist M.*, 503 U.S. 347 (1992), Judge Kleinfeld reasoned that "[t]he 'substantial compliance' standard [of 42 U.S.C. § 602(a)(27)] does not 'unambiguously confer' enforceable rights on any individual." Pet. App. 39a. He explained that "Congress, by the use of the word 'substantial,' expressly provide[d]

that enforcement need not be 100%" (*id.* at 39a-40a) and that as a consequence, "[n]o custodial parent can say, under this statute, 'Congress gave me a right to have the state do something in my case which it is failing to do.'" *Id.* at 41a. He therefore found that "[s]tate governments have no reason to suppose, from the text of the statute, that they have to satisfy federal judges as well as the Secretary of Health and Human Services with their child support collection procedures, or else lose AFDC money." *Id.* Judge Kleinfeld concluded that "[i]nferring a private right of action * * * subverts [the statutory] scheme" (*id.* at 45a-46a), in which "Congress gave to the Secretary, not the courts, the authority and discretion to decide whether state governments were substantially complying, and to negotiate plans to bring them into substantial compliance if they were not." *Id.* at 45a.

SUMMARY OF ARGUMENT

1. As an initial matter, the court of appeals went astray in determining the existence of an enforceable "right" through application of the three-part test set out in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). That test is properly used when the statute at issue imposes unconditional duties directly on a unit of government. But it is not, at least as a general matter, appropriately applied when federal-state funding statutes are asserted to create rights within the meaning of Section 1983. Such funding provisions are "in the nature of a contract." *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). As a consequence, programs like Title IV-D are, in essence, federal-state contracts in which the parties to the agreement have undertaken to assist third-party beneficiaries. And it is most unlikely that the drafters of Section 1983 would have understood the terms of such a contract to create rights enforceable by third party beneficiaries. To the contrary, it was generally accepted at the time of the enactment of Section 1983's predecessor that—with the exception of contracts where

the third party itself offered consideration—such beneficiaries could not sue for the contractual benefits.

2. If Title IV-D does create rights, by its plain terms it guarantees only that participating States will *adopt plans* that contain specified provisions. Nothing in the statute itself requires that States engage in any specific substantive measures. The Court consistently has read federal-state funding statutes in this fashion, holding that they do "place a requirement on the States, but that requirement only goes so far as to ensure that the State ha[s] a plan approved by the Secretary which contains the * * * listed features." *Suter* v. *Artist M.*, 503 U.S. 347, 358 (1992). Here, that conclusion is confirmed by the structure of Title IV-D: by demanding only "substantial compliance" with the state plan, Congress did not assure that any individual would obtain a specific benefit, an absence suggesting that Congress did not intend to create a private remedy.

ARGUMENT

TITLE IV-D OF THE SOCIAL SECURITY ACT DOES NOT CREATE RIGHTS THAT ARE ENFORCEABLE UNDER 42 U.S.C. § 1983

The parties in this case agree that not all violations of federal laws are cognizable under 42 U.S.C. § 1983. Rather, as the Court repeatedly has emphasized, "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). *See also Suter* v. *Artist M.*, 503 U.S. 347, 357 (1992); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981). The dispositive question here, then, is whether Title IV-D creates a federal "right" that is enforceable under Section 1983. Although the court of appeals purported to ask that question, in our view the

court went fundamentally astray both in identifying the considerations relevant to its answer and in conducting its analysis of those considerations.

I. PROGRAMS CREATED UNDER THE SPENDING CLAUSE GENERALLY DO NOT GIVE RISE TO ENFORCEABLE RIGHTS IN THE PROGRAMS' BENEFICIARIES

A. The court of appeals assumed that the question whether Title IV-D creates rights under Section 1983 should be analyzed by looking to the considerations identified by the Court in *Wilder*: whether the statute was designed to benefit the putative plaintiffs, imposes binding obligations on the defendant governmental unit, and is not " 'too vague and amorphous' [as] to be 'beyond the competence of the judiciary to enforce.' " *Golden State*, 493 U.S. at 106, quoting *Wright* v. *Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 431-32 (1987). When a statute (or constitutional provision) imposes unconditional duties directly on a unit of government, as was true in *Dennis* v. *Higgins*, 498 U.S. 439 (1991) and *Golden State*, we agree that application of the three-part test is appropriate. That approach plainly accords with the intent of Congress when it enacted Section 1983 in 1871. The legislative debates did not address the sorts of statutes that were thought to create "rights."[5] The term, however, had an accepted meaning at the time: rights were understood to embrace those things that could " 'be lawfully claimed' " (Cong. Globe, 42d Cong., 1st Sess. 313 (1871) (remarks of Rep. Burchard (citation omitted)), encompassing "an enforceable claim or title to any subject matter whatever." W. Anderson, *A Dictionary of Law* 905 (1893). While there is an element

[5] That is hardly surprising, since deprivations of rights secured by law were not made actionable under Section 1983's predecessor until 1874. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608-09 (1979).

of circularity to this definition—a right was an enforceable claim, while enforceability of a claim turned on whether it asserted a right—rights plainly were understood to flow from those laws that imposed direct and unconditional proscriptions for the benefit of particular individuals. The courts of the time in fact recognized common law rights of action only under such statutes. *See, e.g., Hayes* v. *Michigan Central R.R. Co.*, 111 U.S. 228, 240 (1884); *Pollard* v. *Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874); T. Cooley, *Law of Torts* 790 (2d ed. 1888).

At the same time, the history suggests that the *Wilder* test should not, at least as a general matter, govern the identification of rights under what the Court has termed "a mere federal-state funding statute." *Pennhurst*, 451 U.S. at 18. As the Court has explained, federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* at 17. In particular, a spending program such as Title IV-D is, in essence, a federal-state contract in which the parties to the agreement have undertaken to assist third-party beneficiaries, which in this case include respondents. And it is most unlikely that the drafters of Section 1983 would have understood the terms of such a contract to create rights enforceable by the third-party beneficiaries.

To the contrary, at the time of the enactment of Section 1983 it generally was accepted that—with the exception of contracts where the beneficiary was owed a preexisting duty by the promisee, usually as the result of performance amounting to consideration by the beneficiary —third party beneficiaries could not sue on contracts. As

Story explained long before the enactment of Section 1983's predecessor:

> It is now well settled, as a general rule, though the early cases are quite contradictory on this point, that in cases of simple contract, if one person makes a promise to another for the benefit of a third, although no consideration move from such third person, it is binding * * *. The principal difficulty seems to be in determining in which party the right of action resides. *As between the plaintiff and defendant, there must be a privity of contract,* and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff.

W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82-83 (1844, reprint ed. 1972) (emphasis added) (footnotes omitted).

This proposition was uniformly accepted at the time. Writing almost contemporaneously with the enactment of Section 1983's predecessor, for example, Langdell concluded that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise." C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). Langdell also observed "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise," adding that this "proposition is so plain upon its face that it is difficult to make it plainer by argument." *Ibid.*[6] Not surprisingly, then,

[6] This proposition was widely acknowledged. *See, e.g.*, J. Clark Hare, *The Law of Contracts* 193 (1887) ("it is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to the parties, and cannot be enforced by third parties"); 1 F. Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party

this Court recognized "the general rule that privity of contract is required" to support an action for enforcement. *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124-25 (1878).[7]

with whom a contract is made is the proper plaintiff in a suit upon such a contract, although the beneficial interest is in other persons."); *id.* at 426-27 (noting exceptions to rule but affirming that action cannot be maintained "where the contract is made by a sealed instrument"); 1 W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" in the United States is to hold "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); 2 F. Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"); *id.* at 156-57, 162-70. Indeed, it appears that the rights of donee beneficiaries were not established in the United States until well into the twentieth century. *See* K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990).

A similar rule was recognized under English common law in the nineteenth century. Although earlier cases had suggested that a child could sue as a beneficiary under a contract made on its behalf by a parent (*see* A. Farnsworth, *Contracts* § 10.2, at 712 (1982)), that exception was repudiated in 1861 in a case that affirmed the vitality of the rule precluding third parties from recovering on contracts. *Tweddle* v. *Atkinson*, 1 B. & S. 393, 121 Eng. Rep. 762 (1861). As one Lord explained in subsequently reaffirming *Tweddle*, "in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it." *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] App. Case 847, 853. While plaintiffs occasionally may obtain third party contractual benefits in courts of equity, it remains the rule in England that third party beneficiaries generally have no rights at law. *See* A. Farnsworth, *supra*, § 10.2, at 713.

[7] While there were narrow exceptions to this rule, virtually all cases recognizing such exceptions involved plaintiffs who either were related to the promisee or who themselves had performed services amounting to consideration. *See* 2 F. Wharton, *supra*, at 162-63 (discussing seeming exceptions and noting that most can be explained on other grounds than a general right to recovery by unrelated third parties). This accounts for occasional suggestions in the cases that "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, * * * is now the prevailing rule in this country." *Hendrick* v. *Lindsay*, 93

B. This background has obvious relevance here. It has long been established, of course,

> that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Will v. *Michigan Department of State Police*, 491 U.S. 58, 67 (1989), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). And that presumption must be applied with special force when a departure from the common law approach would impose significant obligations or liabilities on the States (*see, e.g., Will*, 491 U.S. at 65-66; *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1990)) —as almost inevitably will be the case if a State's failure to comply with the terms of a spending program is actionable. *See generally Pennhurst*, 451 U.S. at 24-25. Against this background, a Congress that understood rights to be *enforceable* entitlements could not have intended Section 1983 to authorize actions on the part of the third party beneficiaries of spending programs, when such beneficiaries generally were not entitled to seek performance under the common law.

U.S. 143, 149 (1876). In *Hendrick* itself the plaintiff had executed a bond in reliance on a promise by the defendant to another that if the latter secured a bond to delay execution of judgment the defendant would guarantee the issuer against loss. Thus, the plaintiff suing in *Hendrick* essentially had been in privity with the parties to the contract and had provided consideration. *Id.* at 146-48. And, as discussed in text, whatever exceptions existed, the treatise writers of the day—including such leading figures as Story and Langdell—uniformly agreed that the general rule was that only those from whom consideration had moved could themselves sue for performance of a contract.

This analysis is not novel; the Court, and individual Justices, have expressed considerable skepticism in the past about the proposition that spending programs generally create enforceable rights under Section 1983. Noting that the spending provisions there at issue simply regulated the assurances provided by the State to the federal government about the State's use of federal funds, the Court in *Pennhurst* declared it "at least an open question whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." 451 U.S. at 28. And the four dissenting Justices in *Wilder*, explaining that the provision before the Court simply set out one of the requirements for the plan pursuant to which the State would disburse federal funds, concluded that the statute "is addressed to the States and merely establishes one of many conditions for receiving Federal Medicaid funds; the text does not clearly confer any substantive rights on Medicaid services providers." 496 U.S. at 527 (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting). Most recently, the Court reaffirmed the principle that enforceable rights are created by federal-state funding statutes only when such statutes unambiguously impose binding obligations on the States. *Suter*, 503 U.S. at 363.

Having said this, we recognize that the Court applied the *Golden State* test to hold that the spending provision at issue in *Wilder* created rights within the meaning of Section 1983. But that program differed materially from "a typical funding statute" of the sort at issue here. *Pennhurst*, 451 U.S. at 22. The provision before the Court in *Wilder*, the Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A), was part of a federal-state scheme pursuant to which, among other things, hospitals (the plaintiffs in *Wilder*) provided medical services to needy persons; the federal government offered funds to the States, which in turn agreed to use those funds to re-

imburse health care providers for the medical services provided to needy individuals. *See Wilder*, 498 U.S. at 509. The Boren Amendment thus channeled federal funds directly into the hands of third parties—and did so in return for services rendered by those parties. Viewed in contractual terms, the hospitals provided consideration in the form of medical services. And that is precisely the sort of three-party arrangement in which, at the time of Section 1983's enactment, the third party beneficiary would have been permitted to seek enforcement of the contract's terms. *See National Bank*, 98 U.S. at 124 (stating that one "exception" to the general requirement of privity is "where one person contracts with another to pay money" directly to a third); Hare, *supra*, at 193, 197 (recognizing that the principle permitting one who has offered consideration to sue creates an exception to the general requirement of privity). While the Court's decision in *Wilder* concededly did not advert to the common law background in holding that the Boren Amendment created enforceable rights in the hospitals, the decision's analysis and outcome is wholly consistent with Section 1983's history.

That is not true of the holding below. While AFDC recipients may give consideration for their AFDC benefits by assigning their rights to the State, 42 U.S.C. § 602(a)(26), they do not give consideration for child support enforcement services (which are offered to non-AFDC parents on identical terms). Under the common law at the time Section 1983 was passed, a promise had to depend upon the consideration to be enforceable. "To render a consideration valid, it must * * * be the express or implied condition on which the obligation of the promise depends." Hare, *supra*, at 212. *See also, e.g., Kirkpatrick* v. *Muirhead*, 16 Pa. (4 Harris) 117, 126 (1851) ("The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience, recognized by all of them as the moving

cause."). But receipt of child support enforcement services does not depend upon assignment of an applicant's rights to child support. If an applicant decided not to assign her rights to the State, she would lose AFDC funds, but she could still apply for and receive child support enforcement services. 42 U.S.C. § 654(6). Thus, as the framers of Section 1983 would have understood it, while the beneficiaries of Title IV-D may have enforceable rights to the AFDC welfare benefits, they do not have any enforceable rights as third party beneficiaries to the child support enforcement services provided under Title IV-D.[8]

II. TITLE IV-D DOES NOT CREATE A RIGHT TO DEMAND COMPLIANCE WITH THE STATE PLAN THAT IS ENFORCEABLE UNDER SECTION 1983

A. For the foregoing reasons, Title IV-D of the Act does not create rights that are enforceable under Section 1983. If the Court rejects that conclusion, however, it still must determine the nature of the right established by the statute. The court of appeals found that the statutory right is one to the implementation of a state program that is in fact operated in substantial compliance with the State's plan. But that holding cannot be reconciled with the statutory language and structure.

Title IV-A provides that "[*a*] *State plan* * * * *must* * * * *provide* that the State has in effect a plan approved under part D of this subchapter and operates a child support program in substantial compliance with such plan." 42 U.S.C. § 602(a), (a)(27) (emphasis added). Similarly, Title IV-D indicates that "[*a*] *State plan for child and spousal support must provide*" that the State will

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[8] Viewed in terms that would have been familiar to the drafters of Section 1983, the contract is divisible and there is no consideration for the portion of the contract providing child support enforcement services; thus, the beneficiaries have no enforceable right to those services. *See* Hilliard, *supra*, at 249.

undertake various activities. 42 U.S.C. §§ 654(1)-(24) (emphasis added). On its face, the statute requires only that States promulgate individualized plans, approved by the Secretary, that "contain[] the * * * listed features." *Suter*, 503 U.S. at 358. Nothing in the statute itself requires that States engage in any specific substantive measures. If Titles IV-A and -D create any right at all, then, it is the right to have the State draft a plan that contains the requisite provisions.

Needless to say, Titles IV-A and -D should be read according to their plain terms. The Court took just that approach in *Suter*, where it held that a very similar statute "does place a requirement on the States, but that requirement only goes so far as to ensure that the State ha[s] a plan approved by the Secretary which contains the 16 listed features." 503 U.S. at 358. The Court reached a similar conclusion in *Pennhurst*; interpreting a provision requiring that state recipients of federal funds " 'provide * * * assurances' " that the funds would be used in a particular manner (*see* 451 U.S. at 12-14), the Court indicated that any right created by the statute would support a claim only "that the state plan has not provided adequate 'assurances' to the Secretary." *Id.* at 28. *See id.* at 33 (opinion of Blackmun, J.). Similarly, the Boren Amendment at issue in *Wilder* requires States to adopt plans for the reimbursement of hospitals according to rates "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate." 42 U.S.C. § 1396a(a)(13)(A). The four dissenting Justices read the provision to create a right only to the specified findings and assurances (if it created any right at all) —even though the language of that statute imposed considerably more stringent requirements on the States than does Title IV-D. *See* 496 U.S. at 527-28 (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting).[9]

[9] After the decision in *Suter*, Congress amended part A of Title XI of the Social Security Act to provide:

> In an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan [or] specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter* v. *Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter* v. *Artist M.* that section 671(a)(15) of [the Act] is not enforceable in a private right of action.

42 U.S.C. § 1320a-2. Congress explained that the amendment was intended to assure that individuals could bring suit in federal court "to the extent they were able to prior to the decision in *Suter* v. *Artist M.*, while also making clear that there [was] no intent to overturn or reject the determination in *Suter* that the [provision at issue in *Suter*] does not provide a basis for a private right of action." H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994). This amendment has no bearing on this case. Congress specifically did not disapprove either the holding of *Suter* or the precedents upon which *Suter* relied. As we explain in text, that authority dictates the outcome here. We note that neither the court of appeals nor respondents in their brief opposing the petition for certiorari suggested that Section 1320a-2 has any relevance in this case—or, indeed, so much as cited the provision.

In fact, it is instructive to compare the statute at issue in *Wilder* with Titles IV-A and -D. In rejecting the dissent's analysis, the *Wilder* Court relied entirely on the statutory language requiring States both to find and to make assurances that their rates were reasonable and adequate. *See* 496 U.S. at 512-15. The Court focused in particular on the findings requirement, explaining that "the only plausible interpretation of the [Boren] Amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Id.* at 514-15 (emphasis in original). The majority accordingly answered the United States' argument that the statute required only the provision of assurances

by observing that "[t]his interpretation ignores the language of the statute that requires a State to *find* that its rates are 'reasonable and adequate * * *.'" *Id.* at 513 n.11 (emphasis in original). Here, in contrast, the assertedly rights-creating provision imposes no such independent obligation on the States; it simply provides that participating States must have plans containing certain provisions. Indeed, the authorization for the federal appropriation under Title IV-A declares flatly that "[t]he sums made available under this section shall be used for making payments to States *which have submitted, and had approved by the Secretary, State plans* for aid and services to needy families with children." 42 U.S.C. § 601 (emphasis added).[10]

B. In nevertheless holding that Title IV-D "creates binding obligations upon the state" to implement its plan satisfactorily (Pet. App. 14a), the court of appeals pointed to several provisions of the statute. We note at the outset that the court's analysis on this point suffers from an overarching defect: by their plain terms, all of these provisions indicate no more than that participating States must "have a plan approved by the Secretary which contains the * * * listed features." *Suter*, 503 U.S. at 358. Beyond that, however, each of the individual points made by the court of appeals is flawed.

First, the court pointed to 42 U.S.C. § 602(a)(27), which indicates that the state plan must provide that the State operates its child support program "in substantial compliance" with its plan. Pet. App. 14a.[11] The court

[10] The *Wilder* Court also relied extensively on the legislative history of the Boren Amendment (*see* 496 U.S. at 515-19), which it found to "demonstrate[] clearly that Congress and the States both understood the Act to grant health care providers enforceable rights" (*id.* at 518), adding that the legislative history was "replete with indications that Congress intended that States actually adopt rates that are 'reasonable and adequate.'" *Id.* at 515 n.13. The court of appeals pointed to no such indications in the legislative history of Titles IV-A and -D, and we are aware of none.

[11] The court of appeals did not suggest that Section 602(a)(27) creates binding rights because it indicates that the state plan must provide that the State "has in effect a plan." In this, the court plainly was correct; in *Suter* the Court held that virtually identical language did not create binding rights. *See* 503 U.S. at 359.

itself noted, however, that "[a]t first blush, one might assume that the phrase 'substantial compliance' is no more concrete and unambiguous than the 'reasonable efforts' phrase found problematic in *Suter*." *Ibid.* Equally to the point, virtually identical language in *Suter*—providing for the withdrawal of federal funding upon a finding by the Secretary that " 'there is a substantial failure' in the administration of a plan" (503 U.S. at 360 (citation omitted))—was found not to create binding obligations on the State. *See ibid.*[12]

Second, the court of appeals pointed to 42 U.S.C. § 654, which "sets out at length the specific provisions which must be included in a state plan for child and spousal support." Pet. App. 15a. But that hardly distinguishes this case from *Suter*, where the state plan had to include "16 listed features." 503 U.S. at 358. *See id.* at 359 n.10 (provision does not give rise to cause of action where it "is merely another feature which the state plan must include to be approved by the Secretary").

Third, the court of appeals observed that 42 U.S.C. § 666 "sets forth explicit administrative procedures that a state must establish and implement to ensure the effectiveness of its program." Pet. App. 16a. But the court drew precisely the wrong conclusion from this provision. Section 654(20) declares that a state plan must "provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the

[12] To the contrary, the Court found that the "substantial failure" provision actually cut against the recognition of a right of action under Section 1983: it showed "that the absence of a remedy to private plaintiffs under § 1983 does not make the 'reasonable efforts' clause a dead letter." 503 U.S. at 360-61.

procedures which are prescribed in or pursuant to such laws." Section 666, in turn, provides that "[i]n order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of" specified procedures. This provision requires only that certain laws be in effect, and there is no suggestion that Arizona has failed to comply with that requirement.

Perhaps more fundamentally, Section 666 is the *only* provision requiring specific action by participating States. And even so, while Section 666 declares that laws must be in effect to satisfy Section 654(20)(A), it does *not* indicate that the State actually must "implement the procedures which are prescribed in or pursuant to such laws" to satisfy Section 654(20)(B). The structure therefore strongly suggests that binding requirements are not otherwise imposed on the States. This is plainly a case where "[t]he language of other sections of the Act * * * shows that Congress knew how to impose precise requirements on the States aside from the submission of a plan to be approved by the Secretary when it intended to." *Suter*, 503 U.S. at 361 n.12.

Fourth, the court of appeals observed that "the statute also sets forth detailed criteria for measuring compliance with the statute." Pet. App. 16a, citing 42 U.S.C. § 652(g). But while this provision offers the Secretary guidance in determining when to limit the release of federal funds, the court nowhere explained why it has any bearing on the question whether Title IV-D creates binding obligations. After all, as we already have explained, a similar substantive provision—allowing the Secretary to withhold funds when " 'there is a substantial failure' in the administration of a plan"—was held in *Suter* not to give rise to enforceable rights. 503 U.S. at 360.

C. 1. This last element of the statute—its declaration that "substantial compliance" with its paternity establishment program generally is achieved when a State's "paternity establishment percentage" equals or exceeds 75%

(*see* 42 U.S.C. § 652(g))—points up a basic defect in the court of appeals' analysis. When viewed against the background of the statutory structure, the "right" asserted by respondents is quite a peculiar one. While respondents seek to change the way in which Arizona's child support program is administered, they cannot claim that their individual treatment at the State's hands violated federal law. To the contrary, as Judge Kleinfeld noted, "Congress, by the use of the word 'substantial,' expressly provide[d] that enforcement need not be 100%"; thus, "[n]o custodial parent can say, under this statute, 'Congress gave me a right to have the state do something in my case which it is failing to do.' " Pet. App. 39a-40a, 41a. Surely this "absence of any assured private benefit from the remedy suggests that no private remedy was intended by Congress." *Id.* at 44a-45a.

In contrast, the Court has permitted Section 1983 claims alleging violations of federal-state funding statutes only when the provisions granted particular benefits to specific individuals. In *Wilder*, for example, hospitals alleged the denial of specific benefits, specifically owed to them: sufficient reimbursement for medical services rendered under the Medicaid Act. *See* 496 U.S. at 503. *See also Wright*, 479 U.S. at 419 (addressing claim that public housing authority overbilled plaintiffs for utilities, violating rent ceiling imposed by relevant statute); *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) (addressing claim that Maine deprived plaintiffs of welfare benefits by calculating amount owed in manner that violated relevant statute).

Here, respondents have a considerably more amorphous complaint: that Arizona's program is not sufficiently effective as a general matter. Thus, their principal allegations broadly challenge the "Structure, Operation, and Performance of the Title IV-D program in Arizona." Complaint, part VI(B). To remedy "ineffectiveness" on such a broad scale would, of course, require significant judicial oversight and intervention. The relief requested

in this case reflects that fact. Respondents ask the Court to enjoin the State, not from any specific action, but "from engaging in this pattern and practice of noncompliance and requiring affirmative measures to achieve and maintain substantial compliance with federal law." Pet. App. 7a. The suit thus was brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. It is difficult to conceptualize such an action as one seeking to effectuate individual rights.

2. Indeed, the structure of Title IV-A and -D strongly indicates that Congress did not have individual rights in mind when enacting the statute. Thus, Title IV-D makes use of an intricate enforcement scheme through which the Secretary works with the States to achieve substantial compliance with the requirements of Title IV-D. 42 U.S.C. §§ 604, 652. Only the Secretary is authorized to determine when a State is in substantial compliance. 42 U.S.C. § 652. Furthermore, the Secretary has discretion to determine when to suspend penalties based on a State's corrective action plan. *Ibid.* This discretion allows the Secretary to work with the States in a cooperative fashion to achieve compliance while ensuring that other congressional goals are achieved by maintaining state participation.

Yet federal court supervision, a necessary result of private actions for general enforcement of Title IV-D, inevitably would interfere with the Secretary's role. Indeed, judicial oversight risks subjecting States to obligations beyond those required by the Secretary. For example, the Secretary already has declared Arizona to be in substantial compliance with Title IV-D. Pet. Cert. Rep. Br. App. 1-3. Any determination by a court that the State has further obligations as a condition of funding would be contrary to this decision.

This structure may well establish "a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983." *Suter*, 503 U.S. at 360; *see id.* at 360 n.11. And whether or not that is so, it plainly demonstrates that Congress was concerned, not with individual rights, but with the creation of a cooperative federal-state relationship in which the Secretary would have substantial enforcement discretion. Thus, as Judge Kleinfeld explained,

> The law at issue says, in substance, that states are supposed to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough.
>
> What this lawsuit seeks to accomplish is to lodge the power to decide if states are trying hard enough, and whether their plans to try harder are good enough, in federal judges instead of the Secretary of Health and Human Services. That is contrary to what Congress did. If plaintiffs win the injunction they seek, then probably the district judge will, if the case is handled like many agency continuing inspection cases, appoint a standing master to supervise enforcement. The master will recommend to the district judge how many attorneys and investigators the attorney general should hire and how rapidly the assistant attorneys general should conclude each step of a case. The state will be required to spend however much money it costs to do what the district court decides would achieve "substantial compliance."

Pet. App. 37a-38a.

As this discussion suggests, bringing States into substantial compliance involves balancing a multiplicity of state and federal interests. Child support enforcement is only one of many aspects of the AFDC program.[13] The

[13] The requirement that a State have a plan in conformity with Title IV-D is only one of 45 paragraphs detailing what a State's

Secretary must balance the interest in compliance with Title IV-D against the program's other goals. Reducing funding to the States, or making obligations so onerous that States decide not to participate, risks sacrificing these goals. Yet as Judge Kleinfeld noted, "[u]nlike the Secretary, [federal judges'] decisions cannot be made in a political process, informed by considerations of cost, benefit, and competing claims for money." Pet. App. 37a.

3. Similarly, the notion that Title IV-D creates individual rights cannot be squared with a related aspect of the statutory scheme: Congress's decision to give States substantial flexibility in designing—and, when state plans are ineffective, in fixing—their programs. As discussed above, Title IV-D establishes enforcement through federal-state cooperation, in which the States have the basic responsibility for child support enforcement. In this cooperative scheme, if the Secretary finds a State not to be in substantial compliance, the State may avoid penalties by submitting a corrective action plan that gains the Secretary's approval. 42 U.S.C. § 603(h)(2)(A). Thus, the State is given substantial discretion regarding what corrective actions it will take.

This discretion is crucial to the States, which must balance the needs and priorities of the entire state government. Among other things, States must consider questions of internal government structure. For example, although Title IV-D requires States to establish expedited processes for obtaining and enforcing support orders and establishing paternity, the statute leaves it up to the States to determine whether these processes will be administrative or judicial. 42 U.S.C. § 666(a)(1). States also must coordinate with other branches of the government,

AFDC plan must include. 42 U.S.C. § 602(a). Among other things, States also must include plans for foster care and adoption assistance, 42 U.S.C. § 602(a)(20), and must guarantee child care, 42 U.S.C. § 602(g).

with local governments, and with governments of other States.[14] And obviously, administering Title IV-D includes significant financial considerations.[15] States must balance the needs of other agencies and programs as well as the tax consequences to their citizens. Respondents would eliminate this flexibility from the system.

Needless to say, federal court intervention also defeats the choices made by States when they opted to participate in Title IV-D. Because the maximum statutory penalty for noncompliance is a five percent reduction in AFDC funds, Title IV-D presents the choice of establishing a substantially complying child support enforcement program, or giving up that portion of the State's AFDC funding. Yet one reason the court below determined that a Section 1983 action must be available is that a State could " 'rationally' decide that it is less expensive to lose 1 to 5% AFDC funds than to make the necessary expenditures to meet the federal requirements." Pet. App. 33a. That observation demonstrates that the court fundamentally missed the point: the reason that federal-state funding statutes do not unconstitutionally infringe upon state sovereignty is that States *do* have this choice. *See South Dakota* v. *Dole*, 483 U.S. 203 (1987).

D. The statutory language and structure are clear enough. But even if they are ambiguous on the question whether Title IV-D requires more than promulgation of an appropriate plan, that ambiguity is fatal to respondents' claim. As the Court has held repeatedly,

[14] *See, e.g.*, 42 U.S.C. § 654(4)(B) (regarding reciprocal arrangements with other States and utilization of federal courts); 42 U.S.C. § 654(7) (regarding cooperative arrangements with courts and law enforcement); 42 U.S.C. § 654(8) (regarding cooperation with other States); 45 C.F.R. § 302.10 (plan may be administered by State or State subdivision).

[15] The States spent over $815 million in 1994 on child support enforcement in administrative expenses alone. Child Support Enforcement, Nineteenth Annual Report to Congress at 81, Table 24.

> [t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Pennhurst, 451 U.S. at 17 (1981) (internal citations and quotation marks omitted). *See Suter*, 503 U.S. at 356. *Cf. Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985). Here, "[c]areful examination of the language relied upon by respondents, in the context of the entire Act," should lead the Court "to conclude that the [statutory] language does not unambiguously confer an enforceable right upon the Act's beneficiaries." *Suter*, 503 U.S. at 363. That conclusion should end this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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